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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6061

JACK L. MAYER,

Appellant,

vs.

THE CITY OF CHICAGO,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS AMCUS CURIAE

INTEREST OF THE STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS FILING IN AMICUS CURIAE

The Office of Edward V. Hanrahan, State's Attorney of Cook County, Illinois is submitting the instant *amicus curiae* brief pursuant to the written consent of both parties to this cause. Said brief has been prepared and submitted for the following reasons.

If this Honorable Court requires that the petitioner is entitled to a free transcript, the expense of providing said transcript might have to be undertaken by the Circuit Court of Cook County, whom the Office of the State's Attorney of Cook County represents.

Furthermore, there are eight misdemeanors included under the provisions of the Illinois Criminal Code (Ill. Rev. Stats., Chap. 38 (1969) which provide a fine as the only possible penalty (See Appendix). Since the instant cause will obviously affect the question of free transcripts for defendants convicted of said charges, the State's Attorney of Cook County, entrusted with the responsibility of prosecuting violations of the Illinois Criminal Code within Cook County, wishes to present the instant brief in support of the position taken by the City of Chicago in the present cause.

We would like to acknowledge the assistance in the preparation of this brief of Daniel Pierce, a third year law student at De Paul University, Chicago.

SUMMARY OF ARGUMENT

I.

In *Griffin* v. *Illinois,* 351 U.S. 12 (1956) this Court held that an indigent defendant who has been convicted of a felony charge is entitled to a free transcript for purposes of an appeal. However, this Court also made it clear that a verbatim transcript is not the only method whereby evidence can be presented to an appellate court for review. For example, the use can be made of a bill of exceptions, a method long approved by Illinois and other jurisdictions. Said bill of exceptions can be prepared from the notes of the court, of counsel, or anyone else who was present during the trial. In addition, Illinois Supreme Court has permitted the use on appeal of methods other than a verbatim transcript in Supreme Court Rules 323 (c) and (d).

However, petitioner chose not to avail himself of any of these procedures, contending, instead, that these methods were inadequate. However, since the alternate Illinois procedures have not been shown to be inadequate, petitioner is now estopped from contending that he has a constitutional right to a verbatim transcript.

II.

Williams v. *Oklahoma City,* 395 U.S. 458 (1969) is not controlling, as alleged by the petitioner. Although *Williams* is similar to the instant case in that it also involved the question of the right to a free transcript by an indigent defendant, the other facts presented there are essentially different. Under Oklahoma law, a criminal appellant had to purchase a "case-made," or verbatim transcript, before he was permitted to appeal to the

Oklahoma Court of Criminal Appeals. This Court held that it was a denial of equal protection to preclude an indigent defendant from appealing merely because he was unable to purchase a "case-made," which was the only way to present the evidence of the trial to the reviewing court.

However, in Illinois there are alternative methods to the preparation of a verbatim transcript in which to present an appeal, making this case patently distinguishable from *Williams*.

In addition, the defendant in *Williams* received a 90 day jail sentence, while the instant petitioner received, and indeed could only have received, a fine. As will be noted in Point III, there has been no intent shown by this Court to extend any of the related constitutional rights to defendants convicted of offenses providing for only a fine as a penalty, thereby implying a similar intent regarding free transcripts.

III.

The question of the extent to which constitutional rights are to be applied is often answered in light of the practical considerations facing this Court. For example, although the right to a trial by jury has always been considered as fundamental to the American system of justice, that right has been limited to other than "petty" offenses. The basis for this limitation has been that the need for efficient and speedy adjudication outweigh any benefits which might accrue to defendants accused of petty offenses and who wish jury trials.

Similarly, this Court has impliedly determined that the right to counsel guaranteed in felony trials in *Gideon* v.

Wainwright, 372 U.S. 355, is not to be extended to petty offenses, for this Court has, on at least three occasions, denied certiorari in cases where the question of the right to free counsel to indigent misdemeanants has been raised. In addition, in issuing its recent Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, this Court has not included the right to counsel to indigent defendants in trials involving petty offenses.

The limitations placed on both the right to trial by jury and the right to counsel are grounded on a realization of the practical problems facing the bench with its overcrowded dockets and the bar with inadequate manpower. Taking the same practical approach with the instant question leads to the conclusion that the right of an indigent defendant to a free transcript must be limited to cases where said defendant has been convicted of other than a "petty" offense.

ARGUMENT

I.

SINCE THE PETITIONER MADE NO EFFORT TO UTILIZE ANY OTHER AVAILABLE MEANS TO AFFORD HIM APPELLATE REVIEW, HE IS NOW ESTOPPED FROM CONTENDING THAT THE FAILURE TO PROVIDE HIM A FREE TRANSCRIPT VIOLATED HIS CONSTITUTIONAL RIGHTS.

In the landmark decision of *Griffin* v. *Illinois,* 351 U.S. 12 (1956), your Honors ruled that if a State provides an avenue of appellate review it must also provide a free transcript to any indigent appealing a felony conviction. However, Mr. Justice Black, writing the majority opinion, clearly indicated that a transcript need not be provided in every indigent appeal:

> "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it. The Supreme Court may find other means of affording adequate and effective appellate review to indigent defendants. For example, it may be that bystanders' bill of exceptions or other metheods of reporting trial proceedings could be used in some cases (Illinois cases cited.)." 351 U.S. at 20. (Cf. *Smith* v. *Bennett,* 365 U.S. 708, 710 (1961); *Eskridge* v. *Washington Board of Prison Terms and Paroles,* 357 U.S. 214, 216 (1958); *Johnson* v. *United States,* 353 U.S. 565, 566 (1957).

It is important to note that not only has a long line of cases in Illinois approved the use of bills of exceptions without an accompanying transcript (See dissenting opinion of Mr. Justice Harlan in *Griffin, supra* at page 31), but the use of said method of review has long been historically approved. As was noted by Mr. Justice

White, with whom Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Stewart joined, dissenting, in *Draper* v. *Washington,* 372 U.S. 487, at 502, citing *Miller* v. *United States,* 317 U.S. 192, 198 (1942):

> "Historically a bill of exceptions does not embody a verbatim transcript of the evidence but, on the contrary, a statement with respect to the evidence adequate to present the contentions made in the appellate court. Such a bill may be prepared from notes kept by counsel, from the judge's notes, from the recollection of witnesses as to what occurred at trial, and, in short, from any and all sources which will contribute to a veracious account of the trial judge's action and the basis on which his ruling was invoked."

Further, it is important to observe that the Illinois Supreme Court has acted in a manner consistent with this historical rule by providing in Rules 323 (c) and (d) of its Rules of Practice, alternative methods to a verbatim transcript which may be used for appellate review 43 Ill. 2d R. 23 (1969). Rule 323 (c) provides that the appellant may initially prepare a proposed report of proceedings, which can be amended by the appellee and the final version ultimately approved by the trial court. Rule 323 (d) permits the filing of an agreed statement of facts upon written stipulation.

Yet, despite the availability of historical and statutory methods of reconstructing the record, petitioner has made no effort to utilize any of them. Rather, it is his contention that, were he to proceed under the provisions of these Rules, he might find himself in a procedural trap, being bound to an "agreed" or "settled" statement of facts with which he really doesn't agree. Yet a view

of Rules 323 (c) and (d) clearly indicates that once an appellant has initiated a procedure to try to accurately recapture what occurred at trial, he is not irrevocably bound by what subsequently occurs. Rather, if he feels that his discussion with the Court and other counsel renders incomplete or inaccurate results, he is quite free to then request a verbatim transcript as the only possible method under the circumstances to adequately present what occurred to the reviewing court. But this determination must be made after attempting to utilize these other methods, for as was observed in the dissenting opinion of Mr. Justice White in *Draper* v. *Washington, supra.,* counsel for the petitioner could have prepared and presented to the trial judge a bill of exceptions, "as was his duty." 372 U.S. at 503.

Having failed to attempt to prepare a narrative bill of exceptions, and having explained none of the circumstances which prevented them from doing so, (such an attempt at reconstructing the record was apparently made by petitioner and his counsel in *Williams* v. *Oklahoma City,* 395 U.S. 458 (1969)), the attorneys for petitioner are now estopped from contending that petitioner's constitutional rights were violated when the Illinois Supreme Court refused to grant him a free trnascript. (See dissenting opinion of Mr. Justice Harlan in *Griffin, supra.,* at page 32). Petitioner is simply not free to ignore established available methods of procedure upon the supposition that these procedures possibly might not render adequate results.

II.

THE DECISION IN WILLIAMS v. OKLAHOMA CITY DOES NOT REQUIRE THE GRANTING OF A FREE TRANSCRIPT IN THE INSTANT CASE.

It is the contention of the petitioner that the instant case is "identical in all important respects" with *Williams* v. *Oklahoma City,* 395 U.S. 458 (1969), (Appellant's brief, p. 6) and consequently, *Williams* "controls this case." (Appellant's brief, p. 17). However, a reading of *Williams* reveals crucial differences with the instant case and clearly indicates that the holding in *Wiliams* does not require the granting of a free transcript under facts such as presented in the case at bar.

In *Williaas* it was noted that both the trial court and the Oklahoma Court of Criminal Appeals had ruled with regard to petitioner's motion there that no indigent convicted for a violation of a city ordinance petty in nature, was entitled to a case-made or transcript at city expense in order to perfect his appeal from that conviction.

The definition of a 'case-made' under Oklahoma procedure was found on page 8 of the Brief of the respondent in *Williams* v. *the City of Oklahoma City.* Citing *Bennett* v. *State,* 152 P. 2d 388, the respondent quoted the Oklahoma Court of Criminal Appeals:

> "A 'case-made' consists of those things which transpired in court during the trial and which are not part of the record, while a 'transcript of the Record' contains everything of which the clerk is required to make a record."

This definition indicates that a "case-made" is actually synonomous with a verbatim transcript, while a "tran-

script'' under Oklahoma law includes all other portions of the appellate record.

The pertinent Oklahoma statute (Okla. Stat. Ann. Tit. 22 § 1059 (1958)) required that the appellant order a case-made in all criminal cases appealable to the Oklahoma Criminal Court of Appeals, making the preparation of the case-made (or verbatim transcript), in essence, a condition precedent to the docketing of a criminal appeal in Oklahoma.

The Supreme Court held in *Williams* that since a criminal defendant may take an appeal as a matter of right from any judgment against him, that to limit this right to only those who are able to pay for the preparation of a case-made is an unreasoned distinction forbidden by the Fourteenth Amendment.

However, there is no requirement placed on criminal appellants under Illinois procedure to first purchase a verbatim transcript before being afforded the opportunity to appeal. Petitioner Mayer was permitted to docket his appeal in the Illinois Supreme Court and had available under the Rules of the Illinois Supreme Court methods other than the filing of a verbatim transcript in which to present evidence on appeal. Supreme Court Rules, 323 (c) and (d) state as follows:

> "(c) Procedure if No Verbatim Transcript Is Available. If no verbatim transcript of the evidence or proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. It shall be served within 7 days after the notice of appeal is filed. Within 21 days after the notice of appeal is filed, any other party may serve proposed amendments or his proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present

> the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court, holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. (d) Agreed Statement of Facts. The parties by written stipulation may agree upon a statement of the facts material to the controversy and file it in lieu of and within the time for filing a report of proceedings."

However, as was noted in Point I of this brief, petitioner chose not to utilize either of these means. But, the essential consideration is that alternative, adequate methods to the purchase of a verbatim transcript are possible under Illinois procedure in order to preserve evidence for appeal. Since such alternatives were not available under Oklahoma law, the facts presented in *Williams* are critically different from those in the case-at-bar. Consequently, the holding in *Williams* does not control the decision to be made in the instant case.

Another important distinction to be drawn between *Williams* and the case-at-bar, indicating that *Williams* is not persuasive authority, is that in *Williams* the defendant received a 90 day jail sentence and a $50 fine, whereas in the present case, petitioner received two $250 fines for violations of two City of Chicago ordinances Municipal Code of Chicago, Ch. 11, § 11-33 and Ch. 193 § 1(a)), which provided for maximum penalties of $500. As will be discussed in Point III of this brief, an analysis of related cases by the Supreme Court indicates a manifest intent not to expand the right to free transcripts to include cases where indigent defendants have been convicted of misdemeanors or ordinance violations where the only possible punishment is a fine.

III.

A REVIEW OF SUPREME COURT DECISIONS IN AREAS RELATED TO THE QUESTION OF FREE TRANSCRIPTS FOR INDIGENT DEFENDANTS INDICATES A CLEAR INTENT TO LIMIT THE GRANTING OF FREE TRANSCRIPTS ONLY TO DEFENDANTS WHO HAVE RECEIVED JAIL SENTENCES.

In considering the merits of the present case, this Court is faced with the important question concerning whether or not to extend the right of an indigent defendant to receive a free verbatim transcript for use on appeal to cases where the defendant has been found guilty of a misdemeanor or ordinance violation, where the only possible punishment is a fine.

Although it was stated in *Griffin* v. *Illinois,* 351 U.S. 12 (1956), the first case granting the right to free transcripts to indigent defendants, that the aim of our entire judicial system is to permit all people charged with crime to "stand on an equality before the bar of justice in every American court" (351 U.S. at 17), it is the position of the authors of this brief that this broad language has been, and indeed, must necessarily be, limited by this Court. A brief review of the recent decisions of this Court concerning the right to a jury trial and the right to counsel indicates that this Court has endeavored to determine the rights of individual defendants in light of the rights of all defendants tried by the American judicial process. As Mr. Justice Frankfurter stated in his concurring opinion in *Griffin*:

> "Nor does the equal protection of the laws deny a State the right to make classifications in law when such classifications are rooted in reason. The equality at which the equal protection clause aims is not a disembodied equality. The Fourteenth Amendment enjoins the "equal protection of the laws" and laws are not abstract propositions." 351 U.S. at 21.

Considering the concrete problems facing the bench and the bar of the United States, this Court has limited both the right to jury trials and the right to counsel.

The right to a trial by jury has always been an integral part of our American system of justice. Indeed, trial by jury was described by Mr. Chief Justice Warren in *Singer* v. *United States,* 380 U.S. 24 (1965) as "the normal and preferable mode of disposing of issues of fact in criminal cases." 380 U.S. at 35. In 1968, this Court was faced with the question of determining whether the Sixth Amendment, guaranteeing the right to a speedy and public trial in all criminal prosecutions, was to be made applicable to the states by the Fourteenth Amendment. In holding that the Sixth Amendment guarantees were protected against state action by the Due Process Clause of the Fourteenth Amendment, this Court in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) noted that "trial by jury in criminal cases is fundamental to the American scheme of justice." (391 U.S. at 149). Yet, this Court also stated that it has been the long-established view that "petty offenses" may be tried without a jury. The rationale for this limitation was rooted in an historical view of jury trials:

> "So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury

> trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, *and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury adjudications.*" 391 U.S. at 160 (Emphasis added)

When this Court was later called on to decide what was to be considered "petty" for the purposes of determining the right to a trial by jury, it ruled that a possible six-month penalty is short enough to permit classification of the crime as "petty." *Baldwin* v. *New York,* 399 U.S. 66 (1970). Although this Court admitted that the disadvantages facing a defendant charged with a crime punishable with up to six months in prison were "onerous," nevertheless, it followed the posture enunciated in *Dunan, supra.* and held that the detriment incurred by such defendants is clearly outweighed by the benefits accruing to the entire judicial system, i.e., keeping the jury trial courts free to try serious offenses.

Indeed, this Court, in promulgating its new Rules of Procedure for the Trial of Minor Offenses before United States Ma'gistrates, 8 Cr. L. 3091 (January 27, 1971), continued to draw the distinction between "petty" offenses and other crimes by denying the right to a jury in the trials of "petty" offenses. (Rule 3(c)(1)).

This practical approach of analyzing the extent of constitutional rights has also been utilized in determining when an indigent defendant is to be permitted the right to appointed counsel. In 1963 the Supreme Court, in *Gideon* v.*Wainwright,* 372 U.S. 335, determined for the first time that an indigent defendant was entitled to

appointed counsel when being tried for a felony. This Court, in determining whether the Sixth Amendment right to counsel was fundamental and essential to a fair trial and, therefore, made obligatory upon the States by the Fourteenth Amendment, looked to language of past decisions. Such language as: "The right to the aid of counsel is of this fundamental character." *Powell* v. *Alabama,* 287 U.S. 45, 68), and "The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." (*Johnson* v. *Zerbst,* 304 U.S. 458, 462 (1938) led this Court to conclude at 372 U.S. 44:

> "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

This Court, in a companion case to *Gideon* decided the same day, *Douglas* v. *California,* 372 U.S. 353 (1963), extended the right to counsel to appeals from felony convictions. Referring to *Griffin* v. *Illinois,* 351 U.S. 12 (1956), the Court noted that once having granted appellate review, a State may not discriminate against some convicted defendants on account of their poverty. Citing *Griffin* once again, this Court went on to state:

> "For there can be no equal justice where the kind of appeal a man enjoys depends on the amount of money he has." 372 U.S. at 355.

Yet, like the broad language found in *Dunan* (*supra.*), with regard to the fundamental and important nature of jury trials, the language of the *Gideon* and *Douglas* decisions has been limited in practical application. The question of whether the right to counsel extends to an indig-

ent defendant facing misdemeanor charges has been considered by several State and Federal courts, with decisions going both ways.[1] However, this Court has refused to consider the issue on at least three occasions. In *Winters* v. *Beck,* 385 U.S. 907 (1966), this Court denied certiorari in a case where a defendant was sentenced to 30 days in jail and received a $254 fine for the misdemeanor of immorality, after being tried without the assistance of counsel. Mr. Justice Stewart, dissented, along with Mr. Justice Black, noting that he would grant certiorari because the Fifth Circuit had ruled in two other cases that the right to free counsel extends to misdemeanors, thereby causing a conflict in law in the same circuit. (See footnote 1). Similarly, in *DeJoseph* v. *Connecticut,* 385 U.S. 982 (1966) certiorari was denied. In that case a defendant, about to be tried for the misdemeanor of criminal non-support, alleged that he was indigent and requested that counsel be appointed. Counsel was denied, the defendant represented himself, was found guilty, and was sentenced to six months. Once again Mr. Justice Stewart dissented to the refusal to grant certiorari and was joined by Mr. Justice Black and Mr. Just-

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1. Decisions holding that the right to counsel extends to indigent misdemeanor defendants include *Harvey* v. *State of Mississippi,* 340 F. 2d 263 (5th Cir. 1965); *McDonald* v. *Moore,* 353 F. 2d 106 (5th Cir. 1965); *People* v. *Mallory,* 378 Mich. 538, 147 N.W. 2d 66 (Mich. 1967).

Decisions denying court-appointed counsel for misdemeanors include *People* v. *Dupree,* 42 Ill. 2d 249, 246 N.E. 2d 281 (Ill. 1969), Cert. Denied, 396 U.S. 1047 (1970); *Winters* v. *Beck,* 239 Ark. 1093, 397 S.W. 2d 364 (Ark. 1965), Cert. Denied, 385 U.S. 907 (1966); *DeJoseph* v. *Connecticut,* 3 Conn. Cir. 624; 222 A. 2d 752 (Conn. 1966), Cert. Denied, 385 U.S. 982 (1966); *State* v. *Bennett,* 266 N.C. 755, 147 S.E. 2d 237 (N.C. 1966).

ice Douglas. Finally, in *People* v. *Dupree*, 42 Ill. 2d 249, 246 N.E. 2d 281 (Ill. 1969), the defendant was convicted of battery, a misdemeanor and was sentenced to two years probation, with the first 90 days to be served in jail. Since the maximum sentence possible was six months in jail and a $500 fine, the Illinois Supreme Court ruled that the defendant did not have to be informed of his right to counsel. Once again certiorari was denied over the dissent of Mr. Justice Black. 396 U.S. 1047 (1970).

Acting in a manner consistent with the denial of certiorari in these three cases, this Court, in issuing its Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, 8 Cr. L. 3091 (January 27, 1971), pointedly failed to include the right to appointed counsel for indigent defendants charged with petty offenses. (See dissent of Mr. Justice Black with Mr. Justice Douglas for a discussion of the issue at page 3093).

It is the position of the authors of this brief that this decision to limit the right to counsel to indigent defendants accused of non-petty offenses is once again based on practical considerations. As the Illinois Supreme Court noted in *People* v. *Dupree, supra.*:

> "To construe as defendant contends, a constitutional mandate that defendant have counsel in all cases, irrespective of the seriousness of the offense, the punishment involved or defendant's request for counsel, unless the record shows his express waiver, would impose burdens upon the bar and bench in no way required or contemplated by the landmark cases protecting constitutional rights in criminal proceedings." (42 Ill. 2d at 256.)

Indeed, a decision to require counsel for all misdemeanor defendants would be strongly felt by the court

system as a whole and by the bar in particular. The social utility of expending the limited resources of the courts and the bar upon petty cases might well be called into question. Injecting lawyers into the approximately 40,000 to 70,000 misdemeanor cases handled each year by just the courts of Cook County, which also handle 180,000 to 210,000 ordinance violation cases annually, would undoubtedly have profound consequences for the administration of both criminal and civil justice.[2]

Others have made the same observation about this problem in other jurisdictions. See *Cableton* v. *State,* 243 Ark. 351, 420 S.W. 2d 534, 536-38 (Ark. 1967); Comment, *The Indigent Defendants' Right to Counsel in Misdemeanor Cases,* 17 S.W. L.J. 593, 612 (1965).

A concrete example of the impact on the bar of extending the right to counsel to all cases involving fines was found in *People* v. *Letterio,* 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), where the Court of Appeals of New York ruled that no constitutional mandate exists requiring a court hearing a traffic case to advise a defend-

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2. In 1970 the courts of Cook County disposed of 248,207 misdemeanor and ordinance violation cases. *Statistial Report*: *Cases, Fees and Cost, 1967-1970,* prepared by the office of Matthew Danaher, Clerk of the Circuit Court of Cook County, Illinois. The total misdemeanor cases are no longer kept separate from the total number of ordinance violation cases. In 1963, the last time such figures were kept distinct, it was found that there were 4 ordinance violation charges for every misdemeanor charge in Cook County. *Administrative Office of the Illinois Courts, 1967 Annual Report to the Supreme Court,* p. 82. These figures are, of course, exclusive of the over 1,200,000 Cook County traffic cases disposed of annually. *Danaher Report,* p. 12.

ant of his right to counsel. The Court observed at page 672:

> "We point out that the practical result of assigning counsel to defendants in traffic cases would be chaotic. Assigning counsel in but 1% of these millions of cases would require the services of nearly half the attorneys registered in the State (See Tenth Annual Report of Judicial Conference N.Y. Legis. Doc., 1965 No. 90, p. 205)."

Clearly, the limitation placed on the right of an indigent defendant to have the availability of appointed counsel, has been dictated by the practical considerations facing the courts.

Similarly, the question of the extent to which the right to free transcripts by indigent defendants should be applied must be viewed with an eye on the probable impact on the bench and bar. As was noted in footnote 2, there were nearly one-quarter million misdemeanor and ordinance violation cases disposed of in Cook County in 1970. If a constitutional rule were fashioned requiring that indigent defendants convicted of such charges be given free transcripts if they wished, doubtless some of them would avail themself of the opportunity. (It is estimated that 25% of the defendants in misdemeanor cases are indigent. Silverstein, *Defense of The Poor in Criminal Cases in American State Courts* (1965), Vol. 1, pp. 124-125). If but a fraction of one percent of such defendants demanded free transcripts, the effect would be to, in essence, submerge an appellate court system that is already badly losing a battle to dispose of as many cases per year as are filed. The yearly figures published by the Administrative office of the Illinois Courts regarding the five districts of the Appellate Court of Illinois clearly reveal that a severe crisis faces that court. On January

1, 1967, the number of criminal cases pending in the five districts of the Appellate Court totaled 551. Four years later, December 31, 1970, that figure had jumped to 1055, an increase of 91.4%. The civil docket has also increased, but not so dramatically (813 cases on January 1, 1967 to 1206 on December 31, 1970, an increase of 48.3%). Being entrusted with the burden of carrying a greatly increased caseload, the Appellate Court in 1970, disposed of 40 criminal cases which had been on the docket over three years; 153 cases 2 to 3 years old, 85 cases 1½ to 2 years old, 78 cases 1 to 1½ years old, 115 cases 6 to 12 months old, and 94 cases under 6 months old. In short, nearly one-half of the defendants in the 565 cases decided by the Appellate Court of Illinois in 1970 had to wait over a year and a half from the date their appeal was filed until the date the case was decided.

Very bluntly, the Appellate Court finds itself in a vicious circle, with no method available to remove the circle. Although 1496 civil and criminal cases were disposed of in 1970 (1079 with full opinion—an average of 45 opinions per Justice), the Court found itself with a substantially heavier caseload on December 31, 1970, since 1856 cases were filed during the year (360 more cases filed than cases disposed).

Although a new Fifth Division was added to the First District of the Appellate Court in November, 1970, increasing the Appellate Court panels in Illinois from 8 to 9, the increase of the number of Justices by one-eighth will not begin to solve the case-load dilemma. As was noted earlier, the number of criminal cases pending in the Appellate Court has nearly doubled in the last four years and the civil case load has increased by 50 percent. In addition, the Illinois Supreme Court has amended its

own Rule regarding its jurisdiction over criminal matters. Since July 1, 1971, the effective date of the new rules, the Illinois Supreme Court has now become a leave-to-appeal Court, permitting appeal as a matter of right only in criminal cases in which a statute of the United States or the State of Illinois has been held invalid and in appeals by defendants from judgments of the Circuit Courts imposing a sentence of death. All other appeals in criminal cases are to be taken to the Appellate Court (Rule 603, as amended July 1, 1971 Illinois Supreme Court Rules). Quite obviously, the Illinois Supreme Court has divested itself of virtually all its criminal docket, since relatively few cases appear where a criminal statute is held unconstitutional or a defendant is sentenced to death. Since there were 226 criminal decisions rendered by the Illinois Supreme Court in 1970 and since a great percentage of such cases will appear on the Appellate Court dockets in the future, the case-load problem facing the Appellate Courts of Illinois has become even more acute.

In *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967), this Court held that the Sixth Amendment's quaranty of an accused's right to a speedy trial was rendered applicable to the States through the Due Process Clause of the Fourteenth Amendment. If the right to a speedy trial is guaranteed all defendants, most certainly the right to a speedy appeal must also be included. But, when appellate courts such as those in Illinois are already faced with case loads which are impossible to handle adequately, to impose a further burden of deciding cases a number of indigent cases such as the instant case, where the only punishment is a fine, would be a clear denial of due process for those defendants convicted of serious crimes

and awaiting appellate decision. The language of Mr. Chief Justice Warren in this regard in *Coppege* v. *United States,* 369 U.S. 438 (1962) is particularly instructive:

> "No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. . . . The preference to be accorded criminal appeals recognizes the need for speedy disposition of such cases. Delay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement." (369 U.S. at 449.)

Consequently, it is suggested that the same approach this Court has taken with regard to the light to jury trials be taken in deciding the instant issue. Although jury trials are "fundamental to the American scheme of justice" *Dunan, supra.* at 149, this Court has limited the right to jury trials to "petty" offenses, recognizing that the necessity for efficient law enforcement and effective judicial administration outweigh the possible adverse consequences to defendants convicted of petty offenses. *Duncan, supra,* at 160. It is therefore suggested that the term "petty" also be utilized in determining what crimes would justify the granting of a free transcript to an indigent defendant. It is further suggested that the case of *Williams* v. *Oklahoma City, supra,* has already provided the definition of a "petty offense" within this context, i.e., a minimum of 90 days in jail. If this standard were established, then appeals by indigent defendants who will never have to face on day in jail would not be placed on already overcrowded appellate dockets, thereby avoiding even longer determinations of cases involving serious crimes.

The language of Mr. Justice Marshall in *Frank* v. *United States,* 395 U.S. 147 (1969), is relevant to this

discussion. In *Frank,* it was determined that a charge of criminal contempt is still to be considered "petty" for the purposes of determining the right to a jury trial even though the defendant was placed on probation for three years. Mr. Justice Marshall noted at page 151:

> "Probation, of course, is a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself."

Unlike a sentence of probation, where a defendant is quite restricted in his activity—being required to report periodically to his probation officer, being prohibited from associating with certain types of persons, not being permitted to leave the probation district without the permission of his probation officer, etc.; the defendant in the instant case has had no such restraints placed on his freedom. And, under the recent ruling of *Tate* v. *Short,* 401 U.S. 395 (1971), he cannot now be jailed for financial inability to pay the fine.

Consequently, the facts in the instant case indicate even more strongly than *Frank, supra,* that the offenses here involved were "petty" in nature. Having been charged with ordinance violations for which the only possible punishment was a fine, the petitioner was therefore not entitled to a free transcript for purposes of appeal.

However, if it were to be determined that the petitioner should be given a free transcript for appellate purposes, then it would also seem that a defendant ni similar circumstances should be entitled to free counsel on appeal.

As Mr. Justice Schaefer of the Illinois Supreme Court has stated:

> "Of all the rights that an accused person has, the right to be represented by counsel is by far the most

> pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

For a indigent defendant to be given a free transcript, but denied the knowledgeable hand of an attorney to assist him on appeal would be to reduce the appellate process for such a defendant to a "meaningless ritual." *Douglas* v. *California, supra.,* 372 U.S. at 358.

Furthermore, it would seem that if free counsel were to be required in all indigent appeals, the necessity of counsel at trial would be even more essential. For, as was stated in *Gideon* v. *Wainwright, supra.,* citing Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon improper evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 372 U.S. at 344-345.

But, if appointed counsel were to be granted at trial for indigent defendants who were charged with offenses

which only permit a fine as punishment, such as the charges placed on the instant petitioner, then it would seem that free counsel would have to be appointed in all instances where an indigent has been charged with any violation involving a fine. If this were to occur, then the full time services of virtually the entire membership of the bar would be required as appointed counsel. (See *People* v. *Letterio, supra.*) But even if defendants in traffic cases were to be excluded from these constitutional guarantees, the fact nevertheless remains that nearly 250,000 misdemeanor and ordinance violation cases are disposed of yearly in Cook County, Illinois, alone. (See footnote 2, supra.) It cannot possibly be considered, that this Court, realizing the obvious impact on the administration of justice if the right to counsel were extended to such cases, ever contemplated in *Gideon* that the right to counsel should be extended that far.

Realizing the impact that the logical extensions flowing from the ruling petitioner seeks in the case-at-bar, i.e., appointed counsel at both the appellate and trial levels, this Court must consider the practical considerations involved and therefore, limit, as has been done with the right to trial by jury, the right to a free transcript to only when an indigent defendant has been convicted of a "non-petty" crime.

It has been sated that "Illinois has shown a broad and commendable latitute in implementing the principles enunciated in *Griffin.*" *Norvell* v. *Illinois* (dissent), 373 U.S. 420 at 426. Illinois, in exercising its right to promulgate its own Rules of criminal procedure, (*Spencer* v. *Texas,* 385 U.S. 554, 569 (1967)) has ruled that the petitioner is not entitled to a free transcript since he was charged with an offense involving only a possible fine. Since a State has a further right to moke reasonable

classifications without violating the Due Process Clause of the Fourteenth Amednment, (*Griffin* v. *Illinois, supra.* (concurrence by Mr. Justice Frankfurter, 351 U.S. at 24; *Douglas* v. *California ,supra.,* 372 U.S. at 356), the ruling made in the instant case is clearly constitutional, for it is not at all unreasonable to fail to require the same benefits for defendants convicted of "petty" offenses, such as the instant petitioner, as those provided to defendants convicted of "serious" offenses.

CONCLUSION

For the reasons set forth herein, the office of the State's Attorney of Cook Couny respectfully requests that the Order of the Supreme Court of Illinois denying the petitioner a free transcript for his appeal to that Court be affirmed.

Respectfully submitted,

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APPENDIX

CRIMES PUNISHABLE ONLY BY FINE UNDER THE PROVISIONS OF THE CRIMINAL CODE OF ILLINOIS (ILLINOIS REVISED STATUTES, CHAPTER 38 (1969)

12-1. § 12-1. Assault.] (a) A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.

(b) Penalty.

A person convicted of assault shall be fined not to exceed $500.

16-2. § 16-2. Theft of Lost or Mislaid Property.] A person who obtains control over lost or mislaid property commits theft when he:

(a) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner, and

(b) Fails to take reasonable measures to restore the property to the owner, and

(c) Intends to deprive the owner permanently of the use or benefit of the property.

Penalty.

A person convicted of theft of lost or mislaid property shall be fined not to exceed $500 or double the value of such property, whichever is greater.

29A-1. Offering a Bribe.] § 29A-1. A person commits commercial bribery when he confers, or offers or agrees

to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

29A-2. Accepting a Bribe.] § 29A-2. An employee, agent or fiduciary commits commercial bribe receiving when, without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

29A-3. Penalty.] § 29A-3. A person convicted of commercial bribery or commercial bribe receiving shall be fined not to exceed $5,000.

Added by P.A. 76-1129, § 1, eff. Aug. 28, 1969.

32-1. § 32-1. Compounding a Crime.] (a) A person compounds a crime when he receives or offers to another any consideration for a promise not to prosecute or aid in the prosecution of an offender.

(b) A person convicted of compounding a crime shall be fined not to exceed $500.

32-9. § 32-9. Tampering with Public Notice.] A person who knowingly and without lawful authority alters, destroys, defaces, removes or conceals any public notice, posted according to law, during the time for which the notice was to remain posted, shall be fined not to exceed $200.

50—31. Sale of products in obliterated containers—Prohibition—Exception.] § 1. No person shall sell or offer for sale any product, article or substance in a con-

tainer on which any statement of weight, quantity, quality, grade, ingredients or identification of the manufacturer, supplier or processor is obliterated by any other labeling unless such other labeling correctly restates any such obliterated statement.

This Section does not apply to any obliteration which is done in order to comply with Section 2 of this Act.

50—32. Utilization of used containers—Requisites.] § 2. No person shall utilize any used container for the purpose of sale of any product, article or substance unless the original marks of identification, weight, grade, quality and quantity have first been obliterated.

50—33. Penalty.] § 3. Whoever violates any provision of this Act shall be fined not to exceed $1,000.

70—1. Use by persons, firms or corporations—Prohibition.] § 1. No person, firm or corporation shall use the official stationery or seal or a facsimile thereof, of any State supported university, college or other institution of higher education or any organization thereof unless approved in writing in advance by the university, college or institution of higher education affected, for any private promotional scheme wherein it is made to appear that the organization or university, college or other institution of higher education is endorsing the private promotional scheme.

70—2. Penalty.] § 2. Whosoever violates any provision of this Act shall be fined not less than $50 and not to exceed $500.

82—2. Selling, renting or transfering to children—Prohibition.] § 2. It is unlawful for any dealer to sell, lend, rent, give or otherwise thansfer an air rifle to any person under the age of 13 years where the dealer knows

or has cause to believe the person to be under 13 years of age or where such dealer has failed to make reasonable inquiry relative to the age of such person and such person is under 13 years of age.

82—7. Penalties.] § 7. Any dealer violating any provision of Section 2 of this Act is guilty of a misdemeanor and shall be sentenced to pay a fine of not less than $25 nor more than $200 for each offense.

Any person violating any other provision of this Act shall upon conviction be sentenced to pay a fine not to exceed $50 and costs of prosecution.